No. 87-1797

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD GERALD JORDAN,
Petitioner,

v.

STATE OF MISSISSIPPI,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Richard Gerald Jordan submits this reply to the arguments presented by the State of Mississippi in its brief in opposition to Mr. Jordan's petition for a writ of certiorari to the Supreme Court of Mississippi.

I. The State's Opposition, Which Suggests That State Courts in Mississippi Can Disregard This Court's Decision in *Yates v. Aiken*, Underscores the Importance of This Case and the Need for Certiorari.

The State argues that the Supreme Court of Mississippi appropriately declined to address the merits of Mr. Jordan's application for post-conviction relief on the basis of state law principles of *res judicata*. The State makes no attempt to reconcile the state court's refusal to consider the effect of this Court's intervening decision in *Michigan v. Jackson*, 475 U.S. 625 (1986), with this

Court's unanimous holding in *Yates v. Aiken*, 108 S. Ct. 534 (1988), that state courts in collateral proceedings must give effect to intervening decisions of this Court that apply established principles of federal constitutional law.[1] The State does not dispute that if the decision below is allowed to stand, *Yates* will in effect be rendered a nullity in Mississippi: under the practice now prevailing in the state, if a defendant fails to raise a federal constitutional claim on direct appeal, he will typically be held to have waived the claim; if he raises the claim on direct appeal, he will be barred on *res judicata* grounds from relitigating the issue in a state post-conviction proceeding even if there has been an intervening decision by this Court and even if that intervening decision must be applied retroactively under *Yates*. *See* Pet. 15-17 & nn. 27, 28.

Indeed, the State appears to argue that the Supreme Court of Mississippi can simply ignore *Yates* because that court has placed limits on the issues it will consider in state collateral proceedings. *See* Opp. 34. Those supposed limits—the sole factor cited by the State as distinguishing this case from *Yates*—provide no basis for ignoring the *Yates* holding here. As we noted in the

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[1] Although the State appears to argue that *Michigan v. Jackson* should not be applied retroactively in a post-conviction proceeding (an argument not relied on by the court below), it continues to assert (Opp. 29) that *Michigan v. Jackson* "is not new law." Under *Yates v. Aiken*, such an intervening decision must be applied retroactively in collateral proceedings. Given the State's reading of *Michigan v. Jackson*, it is difficult to comprehend its reliance (Opp. 33) on *Allen v. Hardy*, 478 U.S. 255 (1986). In holding in *Allen* that *Batson v. Kentucky*, 476 U.S. 79 (1986), does not apply retroactively in collateral proceedings, this Court emphasized that *Batson* represented "an explicit and substantial break with prior precedent." *Allen v. Hardy*, 478 U.S. at 258. The State's reliance (Opp. 31-33) on *Griffith v. Kentucky*, 107 S. Ct. 708 (1987), is similarly misplaced because, as the State recognizes, *Griffith* concerns the standards for retroactivity with respect to cases pending on direct appeal, not collateral proceedings.

petition for certiorari, and as further illustrated below, the Supreme Court of Mississippi in post-conviction proceedings has reconsidered federal constitutional issues that were addressed on direct appeal in cases, such as this one, in which there has been an intervening decision. Indeed, the Mississippi Collateral Relief Act expressly directs the state courts to entertain successive state collateral petitions where—as here—there has been a controlling "intervening decision of the supreme court of either the state of Mississippi or the United States." Miss. Code Ann. §§ 99-39-23(6), 99-39-27(9) (Cum. Supp. 1987).

The State's efforts to distinguish other post-conviction cases in which, because of the existence of intervening decisions, the Supreme Court of Mississippi has disregarded *res judicata* principles and addressed the merits of federal constitutional claims that had been considered on direct appeal are unconvincing. The State notes that the defendant in *Edwards v. Thigpen*, 433 So. 2d 906 (Miss. 1983), had not previously sought post-conviction relief and argues that the intervening decision, *Enmund v. Florida*, 458 U.S. 782 (1982), on the basis of which the Supreme Court of Mississippi in *Edwards* reexamined its earlier decision, amounted to a "clear departure" from prior precedent.[2] The State, however, does not claim that there is any "substantial state interest," *Henry v. Mississippi*, 379 U.S. 443, 449 (1965), that would justify its courts in refusing (despite the existence of an intervening decision) to reconsider issues that had been addressed on direct appeal and in federal ha-

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[2] Opp. 35. The State is simply wrong in asserting that the Supreme Court of Mississippi in *Edwards* "expressed some confusion" as to whether the issue had been raised and addressed on direct appeal. *Id.* In its opinion in the post-conviction proceeding, the Supreme Court of Mississippi specifically noted that the defendant "admits having raised the point at trial and on motion for a new trial, and on direct appeal here wherein we affirmed." *Edwards v. Thigpen*, 433 So. 2d at 908.

beas corpus proceedings, while permitting reconsideration of the same issue based on the same intervening decision so long as the claim had been addressed only on direct appeal. And even if *Enmund* represented "new law," that factor would not support the state court's willingness to reach the merits of the federal constitutional claim in *Edwards* and the refusal to do so here. *Yates v. Aiken* requires the retroactive application in state collateral proceedings of interpreting decisions that do *not* represent a break with prior precedent.

Similarly, the distinctions that the State draws between Mr. Jordan's case and *Culberson v. State*, 412 So. 2d 1184 (Miss. 1982), are unavailing. Noting that the issue that was reconsidered in *Culberson* involved a claim of ineffective assistance of counsel, the State argues that the Supreme Court of Mississippi has often procedurally treated claims of ineffective assistance of counsel differently than it treats other claims.[3] To be sure, the Supreme Court of Mississippi has not applied a contemporaneous objection rule to ineffectiveness claims, recognizing that defendants cannot be expected to object at trial to the competency of the lawyers then representing them. *See Read v. State*, 430 So. 2d 832, 838-39 (Miss. 1983). But that has nothing to do with the state court's application of *res judicata* principles.[4] In *Culberson*, on

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[3] Opp. 35-38. The State also cites two cases, *Johnson v. State*, 508 So. 2d 1126 (Miss. 1987), and *Evans v. State*, 485 So.2d 276 (Miss.), *cert. denied*, 476 U.S. 1178 (1986), in which the Supreme Court of Mississippi has refused in a successive post-conviction proceeding to address an ineffectiveness claim that the defendant failed to raise the first time he had an opportunity to do so—in the first post-conviction proceeding. Those cases are inapposite. As noted below (*see* infra p. 6), Mr. Jordan challenged the admission of the tape-recorded statements when he first had an opportunity to do so (in the direct review proceedings), and the Supreme Court of Mississippi below did not rely on any purported waiver.

[4] The State is mistaken in suggesting that the Supreme Court of Mississippi will not apply *res judicata* principles to ineffective-

direct appeal, the Supreme Court of Mississippi rejected the argument that defense counsel had not permitted the defendant to testify, reasoning that a defendant who retains his own counsel waives the right forever to challenge the lawyer's actions. In the subsequent post-conviction proceeding, the Supreme Court of Mississippi reconsidered the issue on the basis of this Court's intervening decision in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), eschewing *res judicata* notions; the state court concluded that the defendant could raise the ineffectiveness claim it previously had held to have been waived. *Culberson v. State*, 412 So. 2d at 1185-86. That is precisely what the Supreme Court of Mississippi has refused to do here—reexamine Mr. Jordan's Sixth Amendment claim in light of this Court's intervening decision in *Michigan v. Jackson*.

This Court this term—in a case also from Mississippi—has again underscored that state courts in state post-conviction proceedings cannot refuse to reach the merits of federal claims, and preclude federal courts from reaching the merits of those claims, on the basis of state procedural bars that the state courts have not "consistently and regularly applied." *Johnson v. Mississippi*, 56 U.S.L.W. 4561, 4564 (U.S. June 13, 1988). That principle applies fully here.

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ness claims raised in a defendant's first post-conviction proceeding where no intervening decision has been issued since the direct appeal. The Supreme Court of Mississippi in *Read* stated that, when the parties stipulate that the record on direct appeal is adequate to address the issue, a claim of ineffectiveness can be resolved on direct appeal. 430 So. 2d at 841-42. In a subsequent post-conviction case in which the defendant so stipulated, the Supreme Court of Mississippi refused to address the merits of the ineffectiveness claim, holding that its decision on direct appeal barred further consideration of the claim. *Smith v. State*, 434 So. 2d 212, 219-20 (Miss. 1983).

II. The State's "Waiver" Arguments Were Not Relied on by the Court Below and Have No Merit.

The State argues that Mr. Jordan waived his Sixth Amendment claim by supposedly failing to press the claim at various stages of the litigation. The simple answer to the State's contention is that in denying Mr. Jordan's application for post-conviction relief, the Supreme Court of Mississippi did not rely on any state rule of waiver or procedural default. Rather, the judgment below rested exclusively on *res judicata* grounds.[5] This Court has emphasized that "[t]he mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case." *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985). *See also Ulster County Court v. Allen*, 442 U.S. 140 (1979). The State's waiver argument therefore, even if it had any basis in law, would not be a bar to the grant of certiorari.

In any event, the waiver contention is baseless. The State does not dispute that Mr. Jordan challenged the admission of the tape-recorded statements—taken from him outside the presence of his attorneys after he requested the assistance of counsel—at trial, on direct appeal to the Supreme Court of Mississippi, and in a petition to this Court for certiorari following the direct appeal.[6] And the State also does not deny that, ever since

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[5] This is evident from the Supreme Court of Mississippi's own statement of its holding: "We hold that the question is *res judicata* and is barred from relitigation." *Jordan v. State*, 518 So. 2d 1186, 1189 (Miss. 1987); App. 8a. Nowhere in the opinion does the Supreme Court of Mississippi discuss, let alone purport to base its decision on, any claim of waiver.

[6] For this reason, the State's reliance on *Johnson v. Cabana*, 818 F.2d 333 (5th Cir. 1987), and *Johnson v. State*, 508 So. 2d 1126 (Miss. 1987), is misplaced. Unlike Mr. Jordan, the defendant in those cases failed to raise his federal constitutional claim on direct

this Court issued its 1986 decision in *Michigan v. Jackson*, Mr. Jordan has vigorously reasserted his federal claim.

Nevertheless, the State contends (Opp. 24-25) that Mr. Jordan waived his Sixth Amendment argument when he did not raise it in a state post-conviction proceeding filed in 1980. There is no requirement in Mississippi law that defendants in criminal cases must reassert in collateral proceedings claims that were presented to the Supreme Court of Mississippi on direct appeal and rejected. To the contrary, the Supreme Court of Mississippi has held on many occasions that claims resolved on direct appeal may not be relitigated in a state collateral proceeding—absent an intervening controlling decision of law, such as *Michigan v. Jackson* here.[7] Indeed, the entire purpose of the 1980 post-conviction proceeding was to give the state courts an opportunity to consider certain claims that had not been addressed on direct appeal. As the State itself acknowledges (Opp. 4, 15-16), Mr. Jordan initiated the 1980 state post-conviction proceeding after the State successfully moved to dismiss a federal habeas corpus petition—which raised the Sixth Amendment claim—filed by Mr. Jordan because Mr. Jordan had not previously presented to the state courts some of the

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appeal or in his initial federal habeas corpus petition; because of that failure, the courts held that the defendant was barred from raising the issue for the first time in subsequent collateral proceedings. *Johnson v. Cabana*, 818 F.2d at 344; *Johnson v. State*, 508 So. 2d at 1127. For the same reason, *Engle v. Issac*, 456 U.S. 107 (1982), *Murray v. Carrier*, 477 U.S. 478 (1986), and *Smith v. Murray*, 477 U.S. 527 (1986), cited by the State (Opp. 28-29), are inapposite. In each of those cases, the defendants failed to assert the claim at issue either at trial or on direct appeal, and the state courts therefore refused to address the issue, relying on the procedural default doctrine.

[7] *See, e.g., Stringer v. State*, 485 So. 2d 274, 275 (Miss.), *cert. denied*, 107 S. Ct. 327 (1986); *Callahan v. State*, 426 So. 2d 801, 803 (Miss.), *cert. denied*, 461 U.S. 943 (1983).

other issues raised in the federal petition. In moving to dismiss the federal petition, the State did not, and could not, argue that Mr. Jordan had failed to present to the state courts his federal constitutional challenge to the admission of the tape-recorded statements and Mr. Jordan accordingly did not reassert that claim in the 1980 state post-conviction proceeding.[8]

The State next contends (Opp. 17, 27) that Mr. Jordan abandoned his Sixth Amendment claim when he failed to seek certiorari from the 1982 decision of the United States Court of Appeals for the Fifth Circuit that denied him habeas corpus relief with respect to his conviction but granted relief with respect to his sentence. As noted, Mr. Jordan had previously filed a petition for certiorari with this Court (from the 1978 judgment of the Supreme Court of Mississippi on direct appeal) raising the same Sixth Amendment issue. In any event, the State cites no precedent for the proposition that a failure to seek certiorari from a judgment in a criminal case constitutes a waiver of all claims, precluding the defendant from bringing a subsequent collateral proceeding. This Court's decisions suggest just the opposite—particularly when the issue has been presented in a prior petition for certiorari and there has been an intervening dispositive case.[9]

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[8] *Cf. Roberts v. LaVallee*, 389 U.S. 40, 42-43 (1967) (defendant who had raised his federal claim in state courts on direct appeal from conviction did not also need to commence collateral proceedings in state courts in order to exhaust state remedies with respect to that claim).

[9] In *Fay v. Noia*, 372 U.S. 391, 435-36 (1963), this Court held that a defendant's failure to seek certiorari from a state court judgment affirming his conviction would not be a bar to the defendant's seeking federal habeas relief. If the State's waiver argument were accepted here, then defendants in Mr. Jordan's situation would have every incentive, at all stages of a case in which a petition for certiorari could be submitted, to file for certiorari and raise every conceivable federal claim they might have out of concern that if they did not do so they would be held to have waived all such

Finally, the State argues (Opp. 29) that Mr. Jordan waived his Sixth Amendment claim by not presenting it as one of the grounds for certiorari in his 1985 petition to this Court from the judgment of the Supreme Court of Mississippi affirming his now-vacated death sentence. That petition for certiorari concerned the 1983 sentencing proceeding, not the 1977 trial that resulted in Mr. Jordan's conviction. Even if a failure to seek certiorari could under some circumstances constitute a waiver of a federal claim in a criminal case, Petitioner could not have raised a challenge in his 1985 petition for certiorari to the admission of the tape-recorded statements at his 1977 trial. *See* Pet. 8 n.12.

Respectfully submitted,

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claims. The recognition that such a situation would "unwarrantably tax[] the resources of this Court" and "be an unnecessar[y] burden[] . . . in the orderly processing of the federal claims of those convicted of state crimes" led in part to this Court's holding in *Fay*. 372 U.S. at 437. *Cf. Davis v. United States*, 417 U.S. 333, 342 (1974) (holding that a federal habeas corpus petitioner was entitled to have his previously-rejected federal claim reconsidered because there had been an intervening relevant decision).